U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF D-G-S- INC.

DATE: SEPT. 16, 2019

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a software services business, seeks to employ the Beneficiary as a senior systems analyst. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based "EB-2" immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Nebraska Service Center denied the petition on the ground that the minimum educational and experience requirements of the labor certification did not support the requested classification of advanced degree professional. On appeal the Petitioner asserts that the Director misinterpreted the minimum requirements for the proffered position as specified on the labor certification, submits additional evidence of the actual requirements, and claims that its minimum requirements support the request of advanced degree professional classification for the Beneficiary.

Upon *de novo* review, we will withdraw the Director's decision. However, we will remand the case for further consideration of two other issues including the Petitioner's ability to pay the proffered wage and whether the Beneficiary meets the minimum experience requirement of the labor certification. After further consideration of these two issues the Director shall enter a new decision.

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national may apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

II. ANALYSIS

A. Labor Certification Supports Requested Classification of Advanced Degree Professional

A petition seeking advanced degree professional classification for a beneficiary "must be accompanied by: (A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty." 8 C.F.R. § 204.5(k)(3)(i). Furthermore, the regulation at 8 C.F.R. § 204.5(k)(3)(i) provides that "[e]very petition under this classification must be accompanied by an individual labor certification . . . [whose] job offer portion . . . must demonstrate that the job requires a professional holding an advanced degree or the equivalent."

The labor certification accompanying the instant petition states in section H that the minimum requirements for the job of senior systems analyst are either: (1) a bachelor's degree in computer science, engineering, information technology, or information systems, or a foreign educational equivalent, plus five years of experience in the job offered; or (2) a master's degree in one of those fields of study, or a foreign educational equivalent, plus two years of experience as a senior systems analyst, a programmer, or an analyst. The Director denied the petition based on a finding that the entries in section H.10 of the labor certification, stating that the Petitioner would accept 24 months of experience in the alternate occupations of programmer or analyst, indicate that the Petitioner would accept less than the five years of post-baccalaureate experience needed to meet the requirements for advanced degree professional classification under 8 C.F.R. § 204.5(k)(3)(i)(B).

The Petitioner asserts that the format of section H.10 is confusing, that it does not lend itself to distinguishing between different lengths of experience coupled with different educational requirements, and that the Petitioner's entries in section H.10 were not intended to reduce the five-year experience requirement stated elsewhere in section H which, coupled with the baccalaureate degree requirement, show that the labor certification supports the petition for advanced degree professional classification.

We must examine "the language of the labor certification job requirements" in order to determine what the job requires. *See Madany v. Smith,* 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith,* 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). Our interpretation of the job's requirements must involve reading and applying the plain language of the alien employment certification application form. *Id.* at 834. Moreover, the labor certification must be read as a whole. "The Form ETA 9089 is a legal document and as such the document must be considered in its entirety." *Matter of Symbioun Tech., Inc.,* 2010-PER-01422, 2011 WL 5126284 (BALCA Oct. 24, 2011) (finding that a "comprehensive reading of all of Section H" of the ETA Form 9089 clarified an employer's minimum job requirements).

According to the Petitioner, the labor certification requires two different combinations of education and experience that would qualify an applicant for the job of senior systems analyst – either a baccalaureate degree and five years of experience or a master's degree and two years of experience, with the same fields of study and acceptable occupations applicable to the alternative degree and experience requirements. As the Petitioner points out, the text of section H.14 supports the asserted requirements. Section H.14 of the labor certification clearly states that the alternative education and experience requirements are (1) a bachelor's degree in computer science, engineering, information technology, or information systems, plus five years of progressive experience as a senior systems analyst, a programmer, or an analyst; or (2) a master's degree in computer science, engineering, information technology, or information systems, plus two years of experience as a senior systems analyst, a programmer, or an analyst.

The Petitioner also points to its Form ETA-9141, Application for Prevailing Wage Determination, submitted to the DOL in conjunction with its labor certification application, which states that the minimum educational and experience requirements for the job are a bachelor's degree and five years of qualifying experience. As further evidence of its intent the Petitioner submits copies of its job postings for the proffered position during the labor certification process, all of which require either a bachelor's degree and five years of experience or a master's degree and two years of experience, with the fields of study and acceptable occupations the same as those specified in the labor certification.

Based on the entire record we conclude that the Petitioner has established, by a preponderance of the evidence, that its minimum requirements for the job offered are either (a) a U.S. bachelor's or foreign equivalent degree in computer science, engineering, information technology, or information systems plus five years of experience as a senior systems analyst, a programmer, or an analyst, or (b) a U.S. master's or foreign equivalent degree in one of the above named fields of study and two years of experience in one of the acceptable occupations. Thus, the labor certification supports the requested classification of advanced degree professional, and we will withdraw the Director's decision to the contrary.

B. Beneficiary's Experience

Although we withdraw the Director's decision, the record does not demonstrate that the petition is approvable. The Petitioner asserts that the Beneficiary has the requisite combination of a bachelor's degree and five years of qualifying experience to meet the labor certification's minimum educational and experience requirements. Since the Beneficiary's bachelor of engineering from the University [redacted] in India, meets the baccalaureate degree level and field of study requirements of the labor certification, the Beneficiary must have five years of qualifying post-baccalaureate experience to satisfy the labor certification's minimum experience requirement and to be eligible for classification as an advanced degree professional under 8 C.F.R. § 204.5(k)(3)(i)(B). As previously indicated, evidence of a beneficiary's experience must be in the form of letters from current or former employers. *Id.*

The record includes the copy of a letter from an official of the Petitioner's affiliated company in [redacted] India, which states that the Beneficiary was employed as a full-time software engineer/analyst for a period of 26 months from February 2012 to April 21, 2014, and lists the Beneficiary's job duties. The record also includes the copy of a letter from [redacted] which states that the Beneficiary was employed for nearly five years, from April 2007 to February 2012, and that his final position was team lead. The [redacted] letter does not state how long the Beneficiary worked as a team lead or what his prior positions were, does not describe his job duties in any of his positions, and does not identify what position the letter's author had in the company.[1] Finally, the record includes a statement from an individual, [redacted] who claims to have been a fellow employee of the Beneficiary's at [redacted] and describes the Beneficiary's job duties there. Mr. [redacted] does not claim to be a [redacted] official, however, so his letter is not an authoritative statement from the company.

In view of these evidentiary deficiencies, we will remand this matter to the Director for further consideration. The Director shall determine whether the Beneficiary meets the minimum experience requirement of the labor certification and of 8 C.F.R. § 204.5(k)(3)(i)(B) for classification as an advanced degree professional. If deemed necessary, the Director may request additional evidence from the Petitioner before making a finding on this issue.

C. Petitioner's Ability to Pay the Proffered Wage

To be eligible for the classification it requests for the beneficiary, a petitioner must establish that it has the ability to pay the proffered wage stated in the labor certification. As provided in the regulation at 8 C.F.R. § 204.5(g)(2):

> The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [USCIS].

As indicated in the above regulation, the Petitioner must establish its continuing ability to pay the proffered wage from the priority date[2] of the petition onward. In this case the proffered wage is

[1] We note that the regulation applicable to professionals at 8 C.F.R. § 204.5(l)(3)(ii)(A) provides that any experience requirements in petitions for professional classification "must be supported by letters from . . . employers giving the name, address, and title of the . . . employer, and a description of . . . the experience of the [beneficiary]."

[2] The "priority date" of a petition is the date the underlying labor certification is filed with the DOL. *See* 8 C.F.R. § 204.5(d).

$108,846 per year and the priority date is October 12, 2017. While the record includes a copy of the Petitioner's federal income tax return, Form 1120, U.S. Corporation Income Tax Return, for 2016, no federal tax return for 2017 or 2018 has been submitted. Nor has the Petitioner submitted any annual reports or audited financial statements for 2017 or 2018. Thus, the record does not include any of the required evidence specified in 8 C.F.R. § 204.5(g)(2) for the priority date year of 2017 or subsequent thereto. In view of this evidentiary deficiency, we will remand the matter to the Director to request regulatory required evidence of the Petitioner's ability to pay the proffered wage from the priority date of October 12, 2017, onward.

USCIS records indicate that the Petitioner has filed multiple Form I-140 petitions for other beneficiaries. The Petitioner must establish that its job offer is realistic not only for the instant Beneficiary, but also for its other I-140 beneficiaries. A petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977). Accordingly, the petitioner must demonstrate its ability to pay the combined proffered wages of the instant Beneficiary and its other I-140 beneficiaries from the priority date of the instant petition until the other I-140 beneficiaries obtain lawful permanent resident status. *See Patel v. Johnson*, 2 F.Supp. 3d 108, 124 (D.Mass. 2014) (upholding our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries). On remand, therefore, the Director should also request further evidence from the Petitioner about its other I-140 petitions and determine whether the Petitioner has the ability to pay its proffered wage obligations on those petitions, as well as the instant petition.

III. CONCLUSION

For the reasons discussed above, we will withdraw the Director's decision and remand this case for further consideration of the Petitioner's ability to pay the proffered wage from the priority date onward and whether the Beneficiary has the requisite experience to meet the terms of the labor certification and qualify for advanced degree professional classification.

ORDER: The Director's decision is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.

Cite as *Matter of D-G-S- Inc,* ID# 5188667 (AAO Sept. 16, 2019)